

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ORIGINAL  
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AUG 16 1995

In the Matter of )  
 )  
Amendment of Parts 21 and 74 of )  
the Commission's Rules With Regard )  
to Filing Procedures in the )  
Multipoint Distribution Service )  
and in the Instructional Television )  
Fixed Service )  
 )  
and )  
 )  
Implementation of Section 309(j) )  
of the Communications Act - )  
Competitive Bidding )

MM Docket No. 94-131

PP Docket No. 93-523

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

United States Wireless Cable, Inc. ("USWC"), through  
counsel and pursuant to Section 1.429 of the Rules, hereby  
petitions for reconsideration and clarification of the Report and  
Order herein (hereinafter "MDS Auction Order" or "Order"), and in  
support hereof respectfully shows as follows:

**I. Para. 59 Should Be Clarified To Permit Digital  
Wireless Cable Service.**

Para. 59 states generally that MDS spectrum may be used  
to provide "other kinds of services" provided that "waivers of  
certain MDS technical rules" are obtained. Para. 59 should be  
clarified to permit digital wireless cable service. The  
Commission has pending before it a Petition for Declaratory  
Ruling in which the wireless cable engineering firm of Hardin &  
Associates, Inc. demonstrates that digital wireless cable service

0414

can be implemented with only minor rule waivers. The Commission should clarify Para. 59 to state that the MDS spectrum to be auctioned will be permitted to be used to provide both analogue and digital wireless cable service, that the Commission will grant requests for technical rule waivers for digital service within the parameters outlined by Hardin, and that other technical waivers for digital service also will be considered on a case by case basis as digital technology is installed.

II. The Proposed Right of First Refusal Over ITFS Leases Should Be Eliminated.

The right of first refusal over ITFS leases proposed in Para. 41 should be eliminated. The proposed right of first refusal would not speed the introduction of wireless service or discourage speculators. Litigation over rights of first refusal would bog down the process. Schools are the best judge of who is a speculator, not the Commission.

The proposal conflicts with state laws that require public contracts to be put out for competitive bids. Many ITFS parties are public schools, colleges and universities whose leases are awarded through competitive bidding. The Commission's proposal would be subject to challenge under state law since it would frustrate local competitive bidding procedures. No basis exists for the Commission to preempt state law governing the award of public contracts.

No reason exists why a BTA auction winner who buys 12 MDS channels also has to be given 20 ITFS channels as a free

bonus. The Commission's job is to put the spectrum into the hands of the public. Once the 20 ITFS channels and the 12 MDS channels are licensed, the Commission's work is done. How the licensees combine their channels or operate them separately is a matter of micro management in which the Commission would expend public resources to no good purpose.

Under existing law that has prevailed since 1983, the FCC has awarded in each wireless cable market 5 separate ITFS licenses, and 6 separate MDS licenses. Wireless cable operators have managed to assemble these multiple licenses into unified systems without aid from the Commission. The Commission's proposal to help the industry consolidate channels is too little too late and smacks of an attempt to increase the value of what is being auctioned by throwing in someone else's property rights.

The proposal conflicts with the contractual rights of the private parties to ITFS contracts. Rights of first refusal would have a chilling effect upon the value of ITFS leases and must be considered a taking of private property. This taking cannot be sustained because what is being taken is being given to another private party, the BTA winner.

The amount of money raised by the FCC from spectrum auctions is de minimus in relation to the annual budget deficit and is insignificant in relation to the national debt. Auctions are a one-time event that will not raise any revenue in future years. Companies who have paid millions for spectrum are unlikely to forfeit their licenses or otherwise permit the

Commission to recover and re-auction their spectrum in the future. Nor is the Commission likely to be able to revise substantially the regulatory scheme in place at the time auctions are conducted since purchasers of licenses at auction are likely to be found by the courts to have acquired property rights in their licenses to a much greater extent than has existed under former licensing procedures. The Commission should adopt regulations based upon what is best from a public policy standpoint, without regard to the impact upon the amount of revenue to be garnered from auctions.

III. The Commission Should Reaffirm Its Intention To Honor ITFS Leases That Meet The Current Rules.

Recent Commission rulings have called into question the validity of all existing ITFS leases making them virtually terminable at will. Such rulings seriously undermine the viability of the wireless cable industry and are contrary to the public interest in the ITFS/wireless partnership.

Attached hereto as Exhibit A is a copy of a pending Application for Review of Staff letters based upon the Central Cass Public School District case. The Commission should grant the application for review simultaneously with elimination of the proposed right of first refusal and thereby reaffirm the basis of the ITFS/wireless partnership that has been integral to this service from its inception.

IV. ITFS Channels Leased To Wireless Cable Operators  
Are Entitled To 35 Mile Radius PSA's.

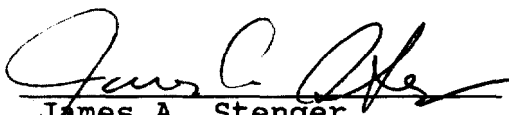
Section 21.933 of the revised Rules states that BTA auction winners must protect "the 56.33 km (35 mile) protected service area of incumbent MDS stations and the registered receive sites of previously proposed and authorized ITFS facilities within that PSA." This rule seriously short changes ITFS stations leased for wireless cable use who have been permitted to request PSA protection equal to MDS stations since the 1991 rule amendments. ITFS stations used in wireless cable service should receive the same 35 mile PSA protection as MDS stations and Section 21.933 should so state.

V. Conclusion

Wherefore, for the foregoing reasons, the Commission respectfully is requested to reconsider and clarify its Order herein as set forth above.

Respectfully submitted,

United States Wireless Cable, Inc.

By:   
James A. Stenger

ROSS & HARDIES  
888 16th Street, N.W.  
Suite 400  
Washington, D.C. 20006  
(202) 296-8600

Its Counsel

Exhibit A

Application for Review

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
HARLEM CONSOLIDATED SCHOOL ) Call Sign WNC-538  
DISTRICT #122 )  
 )  
and )  
 )  
VICTORIA INDEPENDENT SCHOOL ) Call Sign WLX-775  
DISTRICT )  
 )  
ITFS Stations in Rockford, )  
Illinois and Victoria, )  
Texas )

To: The Commission

APPLICATION FOR REVIEW

Harlem Consolidated School District #122 ("Harlem"),  
Victoria Independent School District ("Victoria") and United  
States Wireless Cable, Inc. ("USWC"), through counsel and  
pursuant to Section 1.115 of the Commission's Rules, respectfully  
submit this Application for Review of the two ITFS lease  
amendment rulings released by the Staff on June 1, 1995, copies  
of which are attached hereto as Exhibits 1 and 2 respectively,  
and in support hereof respectfully show as follows:

This application for review requests that the  
Commission correct an apparent inadvertent error in application  
of its rules and policies to ITFS leases. The two enclosed  
letters, if not corrected, would render all ITFS leases

terminable at will by the lessor/licensees. This would undermine the viability of the wireless cable industry, including the ITFS service, and would injure the students and the general public who pay for service from wireless systems. This ruling should be corrected immediately in order to avoid a serious setback to the industry.

The letters require that an ITFS lessor/licensee who decides to terminate its use of ITFS and assign its license to another school that wants to use ITFS must be able to assign the license without assigning the lease along with the license. The new assignee of the license would not be subject to the exiting lease. Thus, all ITFS leases would become terminable at will by the lessor/licensee simply assigning away the license, without also having to assign the lease.

These rulings are erroneous and go far beyond the problem that was sought to be addressed. The leases originally provided that if the lessor/licensee wanted to terminate its use of ITFS, it could assign its license to a new licensee selected by the lessee. In reviewing these leases, the Commission held that this provision was improper because the lessee, rather than the lessor, had the right to select the assignee.

The Commission's decisions in both cases make it quite clear that the Commission wanted a lease amendment that would allow the lessor/licensee to select the assignee, rather than the lessee/wireless cable operator. See Harlem Consolidated, MO&O released Dec. 20, 1994, FCC 94-312, para. 5; Victoria ISD, MO&O



released Jan. 19, 1993, FCC 93-10. In order to respond to the expressed concerns of the Commission, the parties filed lease amendments that give the lessor/licensee the right to select the assignee of the license. Upon filing these lease amendments within the 30 day time period required by the MO&O's, the authorizations were then issued by the Commission.<sup>1/</sup>

The attached Staff letters apparently were issued as a result of a one-line statement concerning an ITFS lease in a routine ITFS comparative decision in Central Cass Public School District, FCC 95-107, released March 20, 1995. The absence of any discussion of the serious consequences of this policy change, wrought in single sentence in the Cass MO&O, indicates the Commission may not have intended to so radically alter Commission law on ITFS leases. The Cass decision holds for the first time that the assignee must be entitled to take the license free of the lease. Cass opines that a requirement that the assignee must take the license subject to the lease "places an unreasonable impediment on the assignment or transfer of the ITFS facility.

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<sup>1/</sup> The enclosed Staff letter was sent to Victoria on June 1, 1995, regarding a lease amendment filed on February 19, 1993, two and a half years earlier. The Staff's admonition in the letter that leasing operations are not to commence until a further amendment is filed presents a practical impossibility since the authorization was issued after the lease amendment was filed in 1993, the station was constructed and is operating. In both cases, the issuance of the authorizations after the lease amendments were filed within the 30 day time period prescribed in the MO&O's would appear to have ripened into final grants that are not subject to revisitation by the Staff at this time. Nevertheless, the applicants for review request reversal of the letters on their merits as well as on procedural grounds in order to remove a precedent that would be contrary to the public interest.

Second Report and Order, 101 FCC 2d at 90." Nothing in the Second Report and Order supports this radical destruction of the contract rights of the wireless cable industry.

The Second Report and Order states that the Commission's main concern in crafting the ITFS leasing rules was to ensure that ITFS licensees retain the power to control the programming on their stations during a substantial portion of the week, the lessor's so-called reserved and preserve time that must total 40 hours per channel per week. The Commission was not concerned about the fact that lessee wireless cable operators would "finance, design, construct, operate and own the physical plant" since this would promote the development of the ITFS service. 101 FCC 2d at 88-90, paras. 98 and 103. The Commission recognized that wireless cable companies would finance the construction and operation of the systems and make lease payments to schools that would increase the financial resources of the schools and enable them to further their educational missions. In return for this, the Commission recognized that wireless cable operators had a legitimate right to use the airtime on the station not used for ITFS:

"In exchange for building an ITFS station and funding its operations, an MDS lessee must expect to gain access to a certain minimum of airtime to make its investment in the ITFS system worthwhile. This trade-off was recognized in Further Notice (83-523), supra at para. 23, and accepted

when the non-ITFS use of excess capacity was first permitted and considered." 101 FCC 2d at 89, para. 102.

Indeed it was. This trade-off was relied upon by numerous wireless cable companies, including publicly traded companies with thousands of shareholders who have invested millions of dollars. The public interest was found to be served by this trade-off that was designed to attract these investments in this service. Reneging on this trade-off is contrary to the public interest as it would discourage reliance upon ITFS contracts and investments in wireless systems.

A requirement that an assignee take a license subject to an existing lease does not unreasonably restrict the assignment of the license. The existing lease must be approved by the Commission and must preserve the required amount of airtime for the use of the licensee. Both of the MO&O's issued in these cases approve the lease provisions concerning programming. Similarly, in the Central Cass case the Commission did not ask for any changes in the lease terms on programming, thereby implicitly approving the critical terms of that lease. Because the programming provisions of the leases are approved and conform to the requirements of the Rules adopted in the Second Report and Order, a requirement that the assignee take the license subject to the lease cannot possibly constitute an unreasonable restriction on the assignment of the license. The new licensee has the same ITFS programming rights as the existing

licensee set forth in the lease that already has been reviewed and approved by the Commission.

The Commission's ITFS leasing rules prescribe the ITFS program provisions that are required to be contained in ITFS leases. See 47 C.F.R. §74.931(e). No rule presently exists that requires that ITFS licenses be assignable free and clear of pre-existing leases. The Cass decision and both of the attached letter rulings fail to cite any existing Rule. ITFS leases should be reviewed by the Staff for conformance to the existing Rule, Section 74.931(e). New rules, if recommended by the Staff and deemed advisable by the Commission, should be put out for notice and comment and should not be adopted in one-liners contained in MO&O's in routine cases adopted on circulation, especially given the expedited circulation procedures now in effect.

But no such rule should be adopted. The Act authorizes the Commission to approve assignments and transfers. The Act does not require that all FCC licenses be freely transferable at all times regardless of pre-existing contracts. If ITFS licenses must be freely transferable and ITFS leases terminable at will, then so must MDS licenses and MDS leases. Also, broadcast stations would not have to honor time brokerage agreements or network affiliation contracts. Any contract with a Commission licensee could be avoided by selling the license, according to the Cass decision and the attached Staff letters.

A requirement that a buyer assume a pre-existing contract of the station as a condition of the sale is not "an unreasonable impediment" to the sale of the station. Every Asset Purchase Agreement contains a list of contracts to be assumed by the Buyer. Frequently, a station cannot be sold unless a buyer assumes an existing studio lease, transmitter site lease, or other contractual obligation of the station. While this may limit the class of potential buyers to those willing to assume pre-existing contracts, this is not an "unreasonable impediment" to a sale. The potential class of purchasers is always limited by numerous conditions in sales contracts relating to pre-existing obligations of the station.

#### Conclusion

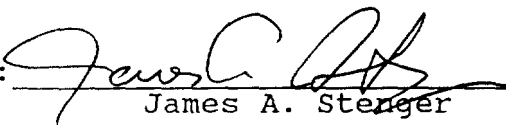
The Central Cass decision should be reversed by reviewing and correcting the attached letters. Both lease amendments should be approved. The decision herein should make clear that an ITFS lease must permit an ITFS lessor/licensee to assign the license to an assignee of the lessor/licensee's choosing, but also may require that the assignee simultaneously agree to an assignment of the existing ITFS lease and take the license subject to the pre-existing rights of the lessee. To do less would be a disservice to the nascent industry that the

Commission seeks to foster, would undermine the ITFS service and would be contrary to the public interest.

Respectfully submitted,

HARLEM CONSOLIDATED SCHOOL DISTRICT #122

VICTORIA INDEPENDENT SCHOOL DISTRICT  
UNITED STATES WIRELESS CABLE, INC.

By:   
James A. Stenger

ROSS & HARDIES  
888 16th Street, N.W.  
Suite 400  
Washington, D.C. 20006  
(202) 296-8600

Their Counsel



Washington D.C. 20554

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

EXHIBIT 1

JUN 01 1995

1800E3-MAE

Harlem Consolidated  
School District #122  
8605 North Second St.  
Loves Park, IL 61130

Re: WNC-538  
Rockford, IL

Gentlemen:

On January 11, 1995, pursuant to the Commission's Memorandum Opinion and Order (FCC 94-312, released December 20, 1994) granting the application of Harlem Consolidated School District #122 (Harlem) for operation of the D-channels in Rockford, IL, your attorney submitted, on your behalf, an amendment to the excess capacity lease agreement between Harlem and United States Wireless Cable, Inc. (U.S. Wireless)

Review of the amendment, by the Commission's staff, reveals that it does not comply with our requirements for such agreements. Specifically, the amendment to the lease provides that if Harlem terminates its lease with U.S. Wireless the Lessor shall be obligated to execute an assignment of all of its rights and obligation under this Agreement and its rights to any FCC License's or license applications covered by this agreement or other FCC authorizations directly related to such ITFS licenses to any FCC qualified entity designated by Lessor. We believe that such a provision places an unreasonable impediment on the assignment or transfer of the ITFS facility. Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523, 101 FCC 2d at 90; Central Cass Public School District, FCC 95-107, released March 20, 1995.

Accordingly, Harlem must amend its lease agreement to conform with our requirements. Furthermore, leasing operations may not begin until such an amendment is submitted to the Commission for approval.

Sincerely,

Clay C. Pendarvis, Acting Chief  
Distribution Services Branch  
Video Services Division  
Mass Media Bureau

cc: James A.. Stenger, Esq.



Washington, D.C. 20554

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

EXHIBIT 2

JUN 01 1995

1800E3-MAE

Victoria I.S.D.  
102 Profit Drive  
Victoria, TX 77902

Re: WLX-775  
Victoria, TX

Gentlemen:

On February 19, 1993, pursuant to the Commission's Memorandum Opinion and Order (FCC 93-10, released January 19, 1993) granting the application of Victoria Independent School District (Victoria) for operation of the B-channels in Victoria, TX, your attorney submitted, on your behalf, an amendment to the excess capacity lease agreement between Victoria and United States Wireless Cable, Inc. (U.S. Wireless)

Review of the amendment, by the Commission's staff, reveals that it does not comply with in all respects to the Commission's requirements for such agreements. Specifically, the agreement requires that any prospective assignee or purchaser, as a condition of the assignment or purchase, shall accept, assume and agree to be bound by all the terms and conditions of the lease agreement as if the purchaser were the original Lessor. We believe that this provision is inconsistent with our requirements in that it places an unreasonable impediment on the assignment or transfer of the ITFS facility. Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523, 101 FCC 2d at 90; Central Cass Public School District, FCC 95-107, released March 20, 1995.

Accordingly, Victoria must amend its lease agreement to conform with our requirements. Furthermore, leasing operations may not begin until such an amendment is submitted to the Commission for approval.

Sincerely,

Clay C. Pendarvis, Acting Chief  
Distribution Services Branch  
Video Services Division  
Mass Media Bureau

cc: James A.. Stenger, Esq.



**CERTIFICATE OF SERVICE**

I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 16th day of August, 1995, served by first-class mail, postage pre-paid, a copy of the foregoing "Petition for Reconsideration and Clarification" to:

The Honorable Reed E. Hundt\*  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

The Honorable Andrew C. Barrett\*  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

The Honorable Rachelle Chong\*  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

The Honorable Susan Ness\*  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

The Honorable James H. Quello\*  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
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Counsel to The ITFS Association

By: Magdalene E. Copp  
Magdalene E. Copp

\* By hand delivery.